

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Effects of Communications Towers on)	WT Docket No. 03-187
Migratory Birds)	

To: The Commission

**COMMENTS OF
UNION TELEPHONE COMPANY**

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Dated: April 23, 2007

EXECUTIVE SUMMARY

Union Telephone Company ("Union"), a provider of wireline and wireless telecommunications service to rural and tribal areas in Wyoming, northwestern Colorado, and parts of Utah, commends the FCC for its efforts to inquire into migratory bird collisions with communications towers.

As described in more detail below, however, Union questions whether the FCC possesses the statutory authority to regulate the siting and construction of communications towers for the purpose of protecting migratory birds. Although the FCC requires tower owners to register certain communications towers, this ministerial registration process does not constitute agency action sufficient to trigger the applicability of either the National Environmental Policy Act of 1969 or the Endangered Species Act of 1973. Even if those statutes were to apply, the FCC's existing environmental rules already comply with the relevant statutory requirements. The Migratory Bird Treaty Act also is not an appropriate basis for statutory authority because it does not apply to the unintentional, incidental deaths of birds resulting from collisions with towers. Finally, the Communications Act of 1934, as amended, fails to authorize the regulation of communications towers for the protection of migratory birds.

Union further notes that the scientific evidence remains insufficient to support the imposition of additional restrictions on communications towers. In particular, the record consists primarily of anecdotal or incidental reports of avian mortality, which are not an adequate statutory basis for agency action. Although the record includes some peer-reviewed scientific studies, these studies (1) contain inherent biases, (2) lack a standardized, systematic data collection process, and (3) have gaps in their analysis of the impact of communications towers on

migratory bird populations. The FCC also should not extrapolate data from those isolated studies to all towers nationwide.

Even if the FCC were to find statutory authority to regulate towers for the purpose of protecting migratory birds, the existing scientific evidence is insufficient to justify the adoption of the rules mentioned in the *NPRM* and in earlier pleadings. The FCC also should decline to adopt these rules as a practical matter because they could make it more difficult to site towers needed to serve rural and tribal areas, result in additional expenditures to retrofit existing towers, delay the deployment of new services, and require the deployment of more towers to cover the same geographic area. If the FCC were to promulgate such rules, it should limit their applicability to new communications tower.

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Union Telephone Company ("Union"), through its undersigned counsel, respectfully submits these Comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned matter,¹ pursuant to section 1.415 of the Federal Communications Commission's ("FCC") rules.² The *NPRM* seeks comment on the adoption of certain measures to reduce the number of migratory bird collisions with communications towers.

Union commends the FCC for its efforts to inquire into the impact of such collisions on migratory bird populations. However, Union questions whether the FCC possesses the statutory authority to regulate the construction of communications towers for the purpose of protecting migratory birds. Union further notes that the scientific evidence remains insufficient to support the imposition of blanket restrictions on communications towers at this time. Even if the FCC

¹ In re Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, *Notice of Proposed Rulemaking*, 21 FCC Rcd 13241 (2006), 71 Fed. Reg. 67510 (Nov. 22, 2006) ("*NPRM*"). On January 12, 2007, the Wireless Telecommunications Bureau extended the filing deadlines for comments and reply comments to April 23 and May 23, respectively. In re Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, *Order*, 22 FCC Rcd 298 (2007).

² 47 C.F.R. § 1.415 (2006).

were to find statutory authority and scientific evidence to regulate towers for this purpose, it should continue its policy of applying additional restrictions on a case-by-case basis.

I. BACKGROUND

Union was founded in 1914 and has a long-standing history of providing vital telecommunications services in underserved rural areas. Based in Mountain View, Wyoming, Union provides local telephone service to approximately 25 rural communities in parts of Wyoming, Colorado, and Utah. In 1990, Union expanded to wireless telecommunications service and now provides, or is licensed to provide, coverage to an area encompassing over 123,611 square miles of mostly rural country, including the Wind River Indian Reservation of the Eastern Shoshone and Northern Arapaho Tribes. Although Union commenced operations with only eight sites, the demand for wireless telecommunications service has caused this number to multiply to more than 200 sites placed throughout Wyoming, northwestern Colorado, and parts of Utah. Besides basic telephone and wireless telecommunications service, Union also offers long distance, Internet, and cable television service.

Union has a strong interest in the *NPRM* because the adoption of new regulatory obligations on existing or proposed communications towers would impose additional burdens on tower owners and spectrum licensees. In particular, Union has constructed and intends to construct a number of wireless communications towers to facilitate the operation of its cellular, Personal Communications Service ("PCS"), Lower 700 MHz, Advanced Wireless Service ("AWS"), and point-to-point microwave licenses. As discussed below, the adoption of new restrictions could make it more difficult to site towers needed to serve rural and tribal areas, result in additional expenditures to retrofit existing towers, delay the deployment of new services, and require the deployment of more towers to cover the same geographic area.

11. THE FCC LACKS THE STATUTORY AUTHORITY TO REGULATE COMMUNICATIONS TOWERS FOR THE PROTECTION OF MIGRATORY BIRDS

Administrative agencies only have the regulatory authority delegated to them by Congress.³ As a "creature of statute,"⁴ the FCC "literally has no power to act . . . unless and until Congress confers power upon it."⁵ Congress has not authorized the FCC to regulate the construction of communications towers for the purpose of protecting migratory birds under the National Environmental Policy Act of 1969 ("NEPA"), the Endangered Species Act of 1973 ("ESA"), the Migratory Bird Treaty Act ("MBTA"), or the Communications Act of 1934, as amended ("Communications Act").

A. The FCC Has No Authority to Regulate the Construction of Communications Towers under NEPA

In the *NPRM*, the FCC tentatively concluded that NEPA "may provide a basis for the Commission . . . to support the promulgation of regulations specifically for the protection of migratory birds."⁶ Although the FCC based this tentative conclusion on its previous determination that the construction of communications towers falls within the purview of NEPA,⁷ section 102(2)(C) of NEPA requires federal agencies to prepare an environmental impact statement only for (1) "major Federal actions" that (2) "significantly affect[] the quality of the human environment."⁸ The construction of communications towers meets neither of these prerequisites for FCC regulation of their environmental consequences. Even if NEPA were to

³ *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

⁴ *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

⁵ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

⁶ *NPRM*, 21 FCC Rcd at 13528¶ 33.

⁷ *Id.*

⁸ 42 U.S.C. § 4332(2)(C) (2003).

apply to the construction of communications towers, the FCC's existing environmental rules already comply with the relevant statutory requirements.

The construction of communications towers fails to constitute a "major federal action." As several commenters note, "the decision to design and build a communications tower is a *private*, not a *federal*, action.'" For geographic-area licenses, such as Union's cellular, PCS, 700 MHz, and AWS licenses, the FCC has no involvement in the siting or construction of individual wireless communications towers. For site-based licenses, such as Union's point-to-point microwave licenses, the FCC reviews the requested locations on the license application to ensure that the proposed operations comply with the relevant technical and operational parameters. In other words, "[t]he FCC does not review, approve, fund, lease, or license individual wireless communications towers."¹⁰

The FCC instead assumes a more limited role in the tower siting process. In particular, the FCC requires tower owners to register a tower in the Antenna Structure Registration ("ASR") database if the tower is more than 200 feet above ground level in height or is located in close proximity to an airport." This registration process is not a "major federal action" because the FCC merely requires the tower owner to certify that the Federal Aviation Administration ("FAA") has approved the tower, without exercising any discretion or control.¹² The federal

⁹ Comments of the Cellular Telecommunications & Internet Association and National Association of Broadcasters 5, 7-8 (Nov. 12, 2003) ("*CTIA/NAB Comments*"); *see, e.g.*, Comments of PCIA on Avatar Environmental, LLC Report 3 (Feb. 14, 2005) ("*PCIA Comments on Avatar Report*").

¹⁰ *CTIA/NAB Comments* at 5.

¹¹ 47 C.F.R. §§ 17.4(a), 17.7.

¹² Although the FCC has ruled that the registration of a tower qualifies as a "major federal action" under NEPA, *In re Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction*,

(continued...)

courts have held that such ministerial agency actions do not rise to the level of a "major federal action."¹³ The registration process also should not constitute a "major federal action" for any towers that an owner registered voluntarily

Even if the tower registration process were a "major federal action," the existing scientific research is insufficient to demonstrate that tower siting and construction "significantly affect[s] the quality of the human environment." As discussed in greater detail in Sections III and IV, the existing scientific studies are speculative and contain fundamental gaps in their research. The scientific evidence also fails to demonstrate that avian mortality is attributable to any particular characteristic of communications towers. Union agrees with other commenters that further research is necessary before the adoption of any additional restrictions on tower siting and construction.¹⁴

Finally, even assuming that NEPA did apply to the siting and construction of communications towers, the FCC's existing environmental rules already comply with the statutory requirements. Under these rules, the FCC "categorically excludes" from further review

Marking, and Lighting of Antenna Structures, WT Docket No. 95-5, *Report and Order*, 11 FCC Rcd 4272, 4289 ¶ 41 (1995), it has not adequately justified this conclusion. Specifically, the FCC improperly conflated the two prongs of the NEPA analysis by basing this conclusion on the potential impact of a tower on the environment rather than on the importance of the registration process. *Id.*

¹³ *E.g., Mayaguexanos Por La Saludy El Ambiente v. United States*, 198 F.3d 297, 301 (1st Cir. 1999). Although the D.C. Circuit held that tower registration triggers the National Historic Preservation Act ("NHPA"), *CTIA v. FCC*, 466 F.3d 105, 112-15 (2006), this case is inapposite because the NHPA requires something less than a "major federal action." The NHPA requires only a federal undertaking, which includes an activity "requiring a Federal permit, license, or approval." 16 U.S.C. § 470w(7) (2000).

¹⁴ *E.g., Reply Comments of the National Association of Broadcasters and CTIA – The Wireless Association on the Avatar Report* 3-8 (Mar. 14, 2005) ("*NAB/CTIA Reply Comments on Avatar Report*"); *Comments of Cingular Wireless on Report by Avatar Environmental LLC* 11-12, 14-16 (Feb. 14, 2005) ("*Cingular Comments on Avatar Report*").

those communications towers that, among other things: (1) will not be located in sensitive areas, (2) will not affect threatened or endangered species, and (3) will not involve high-intensity white lights.¹⁵ While this approach is consistent with the Council on Environmental Quality's guidelines¹⁶ and case law,¹⁷ the FCC also has upheld its existing environmental rules against a challenge to their compliance with NEPA.¹⁸

B. The ESA Does Not Apply to the Siting or Construction of Communications Towers

In the *NPRM*, the FCC identified the ESA as a potential source of statutory authority for the imposition of additional restrictions on communications towers.¹⁹ Section 1536(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."²⁰

The ESA does not authorize the FCC to regulate communications towers for the purpose of protecting migratory birds. Although the FCC requires tower owners to register certain communications towers, this registration process does not constitute "agency action" under the ESA because the FCC merely engages in a non-discretionary acceptance of the FAA's

¹⁵ 47 C.F.R. § 1.1306(b).

¹⁶ 40 C.F.R. § 1508.4(2006); see *CTIA/NAB Comments* at 15-18.

¹⁷ E.g., *Citizens' Comm. to Save Our Canyons v. Forest Serv.*, 297 F.3d 1012, 1023-24 (10th Cir. 2002); *National Trust for Historic Preservation v. Dole*, 828 F.2d 776, 782-83 (D.C. Cir. 1987).

¹⁸ In re Public Employees for Environmental Responsibility, RM-99 13, *Order*, 16 FCC Rcd 21439, 21439 ¶ 1 (2001).

¹⁹ *NPRM*, 21 FCC Rcd at 13244-46, 13257-58 ¶ 7-8, 33.

²⁰ 16 U.S.C. § 1536(a)(2) (2000).

determination of no hazard.²¹ Even if the registration process were to qualify as an "agency action," the ESA would not authorize the FCC to regulate towers are not registered in the ASR database or that were registered voluntarily.²²

To the extent that the ESA applies to the siting and construction of communications towers, the FCC's existing environmental rules already comply with the statutory requirements. These rules require applicants to prepare an environmental assessment for proposed facilities that "[m]ay affect listed or endangered species or designated critical habitats . . . [or] are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats."²³ After receiving an environmental assessment, the FCC will consult with the U.S. Fish and Wildlife Service.²⁴ If the FCC finds that the proposed facility will likely result in an adverse environmental impact, it will prepare an environmental impact statement.²⁵ Thus, the rules comply with the ESA and no additional restrictions are necessary.

C. The MBTA Does Not Authorize the FCC to Regulate the Indirect Taking of Migratory Birds

In the *NPRM*, the FCC sought comment on its responsibilities under the MBTA. Sections 703 and 704(a) of the MBTA provide that it is unlawful to "pursue, hunt, take, capture,

²¹ *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)

²² 47 C.F.R. § 17.14.

²³ *Id.* § 1.1307(a)(3).

²⁴ *Id.* § 1.1308(a) note.

²⁵ *Id.* § 1.1308(b).

kill, attempt to take, capture or kill . . . any migratory bird," unless permitted by the Fish & Wildlife Service.²⁶

The MBTA is not an appropriate basis for jurisdiction over communications towers. As an initial matter, courts have disagreed over the applicability of the MBTA to federal agencies.²⁷ Several federal courts also have interpreted the MBTA to apply only to "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918."²⁸ Based on these interpretations, the MBTA would not apply "to the unintentional, incidental deaths of birds resulting from collisions with communications towers."²⁹

Although the Fish & Wildlife Service and environmental groups have asserted that the MBTA applies to the death of any migratory bird, this interpretation is untenable. As noted above, almost all federal courts agree that the MBTA does not apply to unintentional bird deaths. The sole exception is a federal district court that did not reach the merits of the case and even

²⁶ 16 U.S.C. §§ 703, 704(a)

²⁷ Compare *Newton County Wildlife Ass'n v. United States Forest Service*, 113 F.3d 110, 114 (8th Cir. 1997) (holding that the MBTA does not apply to federal agencies) and *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (same) with *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 883 (D.C. Cir. 2000) (holding that federal agencies are subject to the MBTA).

²⁸ *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991); see, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004); *Newton County*, 113 F.3d at 114; *Sierra Club*, 110 F.3d at 1555; *Mahler v. United States Forest Service*, 927 F. Supp. 1559, 1573-74 (S.D. Ind. 1996).

²⁹ *CTIA/NAB Comments* at 23-25; see *PCIA Comments on Avatar Report* at 5-6; Reply Comments of Cellular Telecommunications & Information Association 2-3 (Dec. 11, 2003) ("*CTIA Reply Comments*"); Reply Comments of PCIA 4-6 (Dec. 11, 2003) ("*PCIA Reply Comments*"); Comments of Cingular Wireless, LLC and SBC Communications, Inc. 4-6 (Nov 12, 2003) ("*Cingular/SBC Comments*").

acknowledged that the purpose of the statute was to regulate hunting.³⁰ This interpretation also would lead to absurd results because it "would make criminals out of millions of automobile drivers, cat owners and homeowners with picture windows, all of which pose an equal potential to lead to the incidental death of birds."³¹

D. The Communications Act Provides No Authority to Regulate Communications Towers for the Protection of Migratory Birds

The FCC lacks the authority to regulate communications towers for the purpose of protecting migratory birds under the Communications Act. Although Title III of the Communications Act authorizes the FCC to regulate certain issues involving communications towers, none of those provisions cover the protection of migratory birds. The FCC also cannot rely solely on its general public interest responsibilities to regulate towers because those provisions do not constitute independent sources of delegated authority. The imposition of new requirements also would contravene the FCC's statutory mandate.

Title III limits the FCC's authority over communications towers to specific enumerated issues. For example, section 303(q) allows the FCC to regulate communications towers to protect air safety.³² In conjunction with the FAA, the FCC may require the painting and lighting of a tower or may require an owner to dismantle and remove a tower if "there is a reasonable possibility that it may constitute a menace to air navigation."³³ Although section 303(q) authorizes the FCC to regulate specific aspects of communications towers for the purpose of

³⁰ *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp.2d 1070, 1080 (D. Colo. 1999).

³¹ *PCIA Comments on Avatar Report* at 6; see Reply Comments of Cingular Wireless LLC and SBC Communications, Inc. 7 (Dec. 11, 2003) (citing *United States v. FMC Corp.*, 572 F.2d 902, 905 (2nd Cir. 1978)) ("*Cingular/SBC Reply Comments*"); Sprint Comments 5-6 (Nov. 12, 2003) ("*Sprint Comments*").

³² 47 U.S.C. § 303(q) (2001).

³³ *Id.*

promoting air travel safety, this limited purpose does not include the protection of migratory birds.

The FCC also lacks the authority to impose new requirements on communications towers pursuant to its public interest responsibilities under section 303(r). In *Motion Picture Association v. FCC*, the D.C. Circuit recognized that section 303(r) is not itself an independent source of delegated authority.³⁴ The court stated that "[t]he FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue. . . . The FCC must act pursuant to delegated authority before any 'public interest' inquiry is made under § 303(r)."³⁵ If the FCC could rely on this provision as a source of delegated authority, "it would be able to expand greatly its regulatory reach."³⁶

The FCC also would contravene its statutory mandate if it regulated communications towers to protect migratory birds. In this proceeding, the FCC recognized that section 1 of the Communications Act requires it to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide . . . wire and radio communication service."³⁷ The FCC also must regulate wire and radio communications "for the purpose of promoting safety of life and property."³⁸

³⁴ *Motion Picture Ass'n v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002). The court similarly noted that section 4(i) "is not a stand-alone basis of authority." *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *NPRM*, 21 FCC Rcd at 13259 ¶ 35 (citing 47 U.S.C. § 151); *see In re Effects of Communications Towers on Migratory Birds*, WT Docket No. 03-187, *Notice of Inquiry*, 18 FCC Rcd 16938, 16940 ¶ 5 (2003) (citing Preamble to Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)).

³⁸ 47 U.S.C. § 151; *see Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004*, Pub. L. No. 108-494 § 102(4), 118 Stat. 3986 (codified at 47 U.S.C. § 942 note (Supp.

(continued...)

Commenters agree that the imposition of additional tower restrictions would conflict with these purposes. As a commenter asserted, "[s]trategically located and expertly engineered communications towers are . . . essential to providing a national communications service. . . . A tower's location, height, antenna placement, design, and layout are critical to its ability to transmit communications to the public in the most efficient and effective manner possible."³⁹ Commenters also claim that the promulgation of additional regulations "would essentially paralyze the wireless tower siting process"⁴⁰ and "would impose the most harm on people living in rural America."⁴¹ Other commenters note that additional regulations could limit access to information and technology, adversely affect the economy, and threaten homeland security.⁴² Thus, because the environmental statutes are not intended to supersede the FCC's primary purposes,⁴³ the FCC should refrain from imposing additional regulations on the siting and construction of communications towers.

2006)); Wireless Communications and Public Safety Act of 1999, P. Law 106-81, 113 Stat. 3 § 2(a)(6) (codified at 47 U.S.C. § 615 note (b)).

³⁹ Comments of Washington State Association of Broadcasters 3 (Nov. 6, 2003) ("*WASB Comments*").

⁴⁰ Reply Comments of United States Cellular Corporation 4 (Mar. 14, 2005).

⁴¹ *Cingular/SBC Reply Comments* at 15

⁴² *Sprint Comments* at 2; Comments of the American Petroleum Institute 3 (Nov. 12, 2003) ("*API Comments*"); Comments of The National Association of Tower Erectors 3 (Oct. 17, 2003) ("*NATE Comments*").

⁴³ *E.g., Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976) ("where a clear and unavoidable conflict in statutory authority exists, NEPA must give way.").

111. THE SCIENTIFIC EVIDENCE IS INSUFFICIENT TO SUPPORT THE REGULATION OF COMMUNICATIONS TOWERS TO PROTECT MIGRATORY BIRDS

The FCC lacks the scientific evidence to adopt any additional restrictions on communications towers. The Administrative Procedure Act ("APA") prohibits the FCC from relying on speculative evidence to justify the adoption of rules. The FCC instead must consider the issues relevant to a rulemaking and make an informed decision based on an adequate factual record. The federal courts have evaluated this factual support under the "arbitrary and capricious" standard of the APA.⁴⁴ Although the APA does not delineate the amount or type of evidence necessary to justify the promulgation of rules, the federal courts have repeatedly held that mere speculation "is an inadequate replacement for an agency's duty to undertake an examination of the relevant data and reasoned analysis."⁴⁵

The existing scientific evidence fails to meet the legal standards necessary to support the promulgation of any additional restrictions on communications towers. As an initial matter, this evidence consists primarily of anecdotal or incidental reports. The FCC should require empirical evidence from peer-reviewed scientific research studies before adopting any rules relating to migratory birds. Even if the FCC were to find anecdotal evidence probative, Union, like several

⁴⁴ 5 U.S.C. § 706(2)(A) (2007).

⁴⁵ *Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994); *see e.g., Natural Resources Defense Council v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988) (holding that agency actions based upon speculation are arbitrary and capricious); *Specialty Equip. Mkt. Ass'n v. Ruckelshaus*, 720 F.2d 124, 137 (D.C. Cir. 1983) (holding that agency's lack of justification demonstrates action was arbitrary and capricious). Commenters also assert that the evidence in the record is insufficient under the Data Quality Act, 44 U.S.C. § 3516 note (Supp. 2006), and the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005). Comments of CTIA – The Wireless Association and National Association of Broadcasters on Avatar Report 10-11 (Feb. 14, 2005) ("*CTIA/NAB Comments on Avatar Report*"); *CTIA/NAB Comments* at 25-30.

other tower owners and wireless providers, has never seen or heard reference to any avian mortality issues in regular visits to its over 200 antenna sites.⁴⁶

Although the record includes some peer-reviewed studies, commenters identify fundamental gaps in this research. For example, several commenters observe that these studies "have not been conducted in a scientifically rigorous manner."⁴⁷ Commenters agree with Avatar Environmental, LLC ("Avatar") that the studies suffer from inherent biases, such as habitat, scavenger/predator removal, bird crippling, and search efficiency.⁴⁸ Commenters further report that the scientific studies lack a standardized, systematic data collection process, "mak[ing] any comparative analysis of prior studies problematic."⁴⁹ These studies also have gaps in their analysis of the impact of communications towers on migratory bird populations, such as (1)

⁴⁶ E.g., Reply Comments of United States Cellular Corporation 6 (Dec. 11, 2003) ("*USCC Reply Comments*"); *NATE Comments* at 2; *WASB Comments* at 2; Comments of the Chickasaw Nation 2 (Oct. 27, 2003); Letter from Rita Smagge, Executive Director, Kenaitze Indian Tribe I.R.A., to Jeffrey S. Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 2, 2003).

⁴⁷ Woodlot Alternatives, Inc., An Assessment of Factors Associated with Avian Mortality at Communications Towers – A Review of Existing Scientific Literature and Incidental Observations 3 (2003) (attached to Comments of PCIA (Nov. 12, 2003)) ("*Woodlot Report*").

⁴⁸ E.g., E-mail from Albert M. Manville, Acting Chief, Branch of Bird Conservation, Division of Migratory Bird Management, U.S. Fish & Wildlife Service, to FCC (Feb. 11, 2005); Avatar Environmental, LLC, Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final 4-5 through 4-6 (2004) ("*Avatar Report*"); Woodlot Alternatives, Inc., Technical Comment on *Notice of Inquiry Comment Review, Avian/Communications Tower Collisions, Final* (Avatar et al. 2004) 4 (2005) (attached to *CTIA/NAB Comments on Avatar Report*) (Feb. 14, 2005); *CTIA/NAB Comments on Avatar Report* at 6; *PCIA Comments on Avatar Report* at 7-8.

⁴⁹ *Cingular Comments on Avatar Report* at 4, 13-14; see, e.g., Letter from Albert M. Manville, II, Senior Wildlife Biologist, Division of Migratory Bird Management, U.S. Fish & Wildlife Service, to G. William Stafford, FCC 3, 6 (Nov. 7, 2003) ("*FWS Comments*"); *Avatar Report* at 4-1; *CTIA/NAB Comments on Avatar Report* at 6; *PCIA Comments on Avatar Report* at 7; *Woodlot Report* at 3; Paul Kerlinger, Avian Mortality at Communications Towers: A Review of Recent Literature, Research, and Methodology 30 (2000), available at <http://migratorybirds.fws.gov/issues/towers/review.pdf> ("*Kerlinger Report*").

neglecting to consider the evidence in the context of other human causes of avian mortality,⁵⁰ (2) excluding towers located in urban areas,⁵¹ (3) limiting the sample size to a few towers in a limited geographic area;⁵² (4) conducting research over a short period of time;⁵³ and (5) failing to provide any scientific evidence of the impact of communications towers on individual species.⁵⁴

Commenters also object to efforts to extrapolate data from isolated studies at a few sites to all towers nationwide. These efforts ignore key variables, such as topography and migration patterns, that differ from site to site and region to region.⁵⁵ The Fish and Wildlife Service even conceded that "it is somewhat meaningless to debate the realistic impact and true mortality caused by communication towers on birds until systematic research is conducted *nationwide*."⁵⁶

IV. THE SCIENTIFIC EVIDENCE FAILS TO SUPPORT THE IMPOSITION OF ANY PARTICULAR RESTRICTIONS

In the *NPRM*, the FCC asked if it should promulgate any specific rules relating to lighting, tower height, tower location, or collocation.⁵⁷ The FCC also asked if applicants should

⁵⁰ *NAB/CTIA Reply Comments on Avatar Report* at 7-8; *Cingular Comments on Avatar Report* at 14-15; Comments of Centerpointe Communications, L.L.C. to Avatar Environmental, L.L.C.'s Report 23-25 (Jan. 19, 2005) ("*Centerpointe Comments*").

⁵¹ Letter from Joelle Gehring, Department of Biology, Central Michigan University, to Louis Peraertz, FCC 1 (Feb. 14, 2005).

⁵² Joelle Gehring and Curry & Kerlinger, LLC, Avian Collision Study for the Michigan Public Safety Communications System (MPSCS): Summary of Fall 2005 Field Season (Dec. 30, 2005) (attached to E-mail from Joelle Gehring, Department of Biology, Central Michigan University, to Louis Peraertz, FCC (Jan. 5, 2006).

⁵³ *Woodlot Report* at 3.

⁵⁴ *NAB/CTIA Reply Comments on Avatar Report* at 7; Reply Comments of Centerpointe Communications, L.L.C. to Avatar Environmental, L.L.C.'s Report 18 (Mar. 14, 2005) ("*Centerpointe Reply Comments*").

⁵⁵ *NAB/CTIA Reply Comments on Avatar Report* at 6; *Centerpointe Reply Comments* at 7-13; Comments of PCIA at 13 (Nov. 12, 2003) ("*PCIA Comments*").

⁵⁶ *FWS Comments* at 4.

⁵⁷ *NPRM*, 21 FCC Rcd at 13260-68 ¶ 38-60.

have to prepare an environmental assessment for every tower.⁵⁸ Assuming, *arguendo*, that the FCC has the statutory authority to regulate communications towers for the protection of migratory birds, the existing scientific evidence remains insufficient to support the adoption of the rules mentioned in the *NPRM*. Practical considerations also militate against the adoption of those rules. Finally, if the FCC were to promulgate such rules, it should limit their applicability to new communications towers.⁵⁹

A. Lighting

The FCC lacks the scientific evidence to mandate the use of medium-intensity white strobe lighting systems on communications towers that are subject to the painting and lighting rules in Part 17. In the *NPRM*, the FCC tentatively concluded that "the use of medium intensity white strobe lights for nighttime conspicuity is to be considered the preferred lighting system over red obstruction lighting systems to the maximum extent possible without compromising aircraft navigation safety."⁶⁰ The FCC based this tentative conclusion, in part, on "the evidence suggesting that white strobe lights may create less of a hazard to migratory birds."⁶¹

The existing scientific studies fail to support the adoption of a white strobe lighting requirement. After reviewing these studies, Avatar determined that "no firm conclusions could be drawn based on the existing literature regarding the importance and effects of lighting color,

⁵⁸ *Id.* at 13268-69¶ 61-64.

⁵⁹ *PCIA Comments on Avatar Report* 3-5; *NAB/CTIA Reply Comments on Avatar Report* at 17.

⁶⁰ *NPRM*, 21 FCC Rcd at 13262¶ 42. Although the FCC also suggested the use of red strobe lights or red blinking lights without red steady lights, it correctly noted that the FAA does not allow such a lighting system. *Id.* at 13263¶ 44. Even if this lighting system were permissible, it suffers from the same lack of scientific support and would generate the same unjustifiable costs.

⁶¹ *Id.*

duration, intensity, and type (e.g., incandescent, strobe, neon, or laser) on bird attraction."⁶² The Fish and Wildlife Service also acknowledged the paucity of scientific evidence on tower lighting.⁶³ In a report prepared on behalf of various environmental organizations, Land Protection Partners admitted that "[c]onclusive evidence is not available that the color of light affects bird attraction."⁶⁴ Although the FCC referred to interim reports from a Michigan tower study as new scientific evidence to bolster its tentative conclusion,⁶⁵ this recently concluded study focused on a small (*i.e.*, twenty-four tower) sample, covered a short time span, encompassed a limited geographical area, and concluded that "[t]here is limited quantitative information about the relationship between the types of FAA lights on communication towers and the attraction of birds to those towers."⁶⁶ This lone study provides scant evidence to support the adoption of a mandatory, nationwide lighting requirement.

The FCC should also decline to mandate medium-intensity white strobe lighting as a practical matter. If the FCC were to require existing towers to switch to white strobe lights, tower owners would incur the additional expense of preparing and filing applications for a new FAA Determination of No Hazard and an amended FCC Antenna Structure Registration. A recent scientific study also found that "converting communication towers with traditional

⁶² *Avatar Report* at 3-47.

⁶³ *FWS Comments* at 7-9.

⁶⁴ Land Protection Partners, Scientific Basis to Establish Policy Regulating Communications Towers to Protect Migratory Birds: Response to Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions with Communications Towers, WT Docket No. 03-187, Federal Communications Commission Notice of Inquiry 19 (Feb. 14, 2005) ("*LPP Report*").

⁶⁵ *NPRM*, 21 FCC Rcd at 13260 ¶ 39.

⁶⁶ *Id.*; Joelle Gehring and Paul Kerlinger, Avian Collisions at Communication Towers: II. The Role of Federal Aviation Administration Obstruction Lighting Systems 11 (2007) ("*Gehring and Kerlinger*").

lighting systems to white strobe systems can be prohibitively costly."⁶⁷ Without more definitive scientific evidence, these expenses are unjustifiable. Commenters also note that new lighting requirements ignore local zoning restrictions on white strobe lights.⁶⁸

Based on the absence of scientific evidence and the practical considerations, further study is necessary before the adoption of a *mandatory* medium-intensity white strobe lighting requirement.⁶⁹ Nevertheless, nothing would prevent the FCC from following the FAA's example and indicating that medium-intensity white strobe lighting is the *preferred* method of lighting new communications towers that are subject to the painting and lighting rules in Part 17.

B. Tower Height

The existing scientific evidence also fails to support the adoption of any restrictions on the height of communications towers. In a review of the scientific literature, Avatar found that "existing data are not sufficient to draw direct conclusions between tower height and migratory bird collisions."⁷⁰ Although the Fish and Wildlife Service adopted voluntary guidelines recommending that communications towers be shorter than 200 feet above ground level,⁷¹ it acknowledged that "tower height alone may not necessarily be a critical issue that results in

⁶⁷ *Gehring and Kerlinger* at 12.

⁶⁸ *NAB/CTIA Reply Comments on Avatar Report* at 12; Reply Comments of PCIA 3 (Mar. 14, 2005) ("*PCIA Reply Comments on Avatar Report*"); *Centerpointe Comments* at 25.

⁶⁹ *FWS Comments* at 7-9; *Avatar Report* at 3-47; *Cingular Comments on Avatar Report* at 10, 14; *PCIA Comments on Avatar Report* at 8; *NAB/CTIA Reply Comments on Avatar Report* at 11-13; *Centerpointe Comments* at 14-15; *API Comments* at 4.

⁷⁰ *Avatar Report* at 3-36.

⁷¹ Letter from Jamie Rappaport Clark, U.S. Fish and Wildlife Service, to Regional Directors (Sept. 14, 2000), *available at* <http://www.fws.gov/migratorybirds/issues/towers/comtow.html>.

mortality."⁷² The Fish and Wildlife Service also conceded that additional research is necessary to determine whether any specific correlation exists between tower height and avian mortality.⁷³

If the FCC were to restrict the height of towers, it should set a much higher threshold than 200 feet above ground level. Although Avatar concluded that "[t]he critical threshold for tower height has not been definitively determined relative to bird collisions,"⁷⁴ it referenced scientific studies indicating that relatively few bird kills occur at towers less than 500 feet in height above ground level.⁷⁵ The Fish & Wildlife Service also noted that "the towers of greatest risk appear to be multiple-guyed, multi-lit (especially with incandescent lighting), *very tall* towers."⁷⁶ Even consultants retained by the Fish & Wildlife Service and environmental groups agreed that towers less than 500 feet pose significantly less risk of avian mortality.⁷⁷ A recent scientific study concluded that "many more avian collisions occur at taller [guyed] towers," *i.e.*, towers that exceed 1,000 feet above ground level.⁷⁸ Thus, commenters generally concur that the existing scientific and anecdotal evidence provides no basis for the adoption of any restrictions on short communications towers.⁷⁹

⁷² *FWS Comments* at 9

⁷³ *Id.*

⁷⁴ *Avatar Report* at 3-36.

⁷⁵ *Id.* at 3-34 through 3-35.

⁷⁶ E-mail from Albert M. Manville, Acting Chief, Branch of Bird Conservation, Division of Migratory Bird Management, U.S. Fish & Wildlife Service, to FCC (Feb. 11, 2005).

⁷⁷ *LPP Report* at 13-14; *Kerlinger Report* at 15.

⁷⁸ Joelle Gehring and Paul Kerlinger, *Avian Collisions at Communication Towers: I. The Role of Tower Height and Guy Wires* 9 (2007).

⁷⁹ *PCIA Reply Comments on Avatar Report* at 3; Reply Comments of Cingular Wireless on Report by Avatar Environmental LLC 10-11 (Mar. 14, 2005) ("*Cingular Reply Comments on Avatar Report*"); *Cingular Comments on Avatar Report* at 6-9; Reply Comments of ARRL 2-4 (Dec. 1, 2003); Comments of S-R Broadcasting Co., Inc. 1 (Jan. 3, 2005).

Finally, the FCC should take practical considerations into account when promulgating any restrictions on tower height. Commenters assert that shorter towers would decrease service coverage and, in turn, would require the use of additional towers.⁸⁰ While commenters report that the use of additional towers would be cost prohibitive, they also assert that the onerous state and local approval processes would hinder the deployment of service.⁸¹ Tower height is also essential to ensure reliable radio communications for public safety agencies.⁸²

C. Tower Location

The FCC should not expand the universe of tower locations deemed to cause a significant environmental impact without additional scientific evidence. Section 1.1307 of the FCC's rules already requires additional environmental processing prior to the construction of towers in officially designated wilderness areas, in officially designated wildlife preserves, or in areas that could affect listed threatened or endangered species or designated critical habitats.⁸³

The existing scientific studies provide no basis for expanding this list. Although some commenters claimed that scientific studies demonstrate a correlation between avian mortality and weather conditions or topographical features,⁸⁴ Avatar found "[n]o studies specifically examining tower siting and associated variables or comparing tower site features were found as part of this review."⁸⁵ Avatar also noted that "insufficient information is available to draw

⁸⁰ *NAB/CTIA Reply Comments on Avatar Report* at 10; *PCIA Reply Comments* at 2; *Cingular/SBC Reply Comments* at 11-12; *API Comments* at 7.

⁸¹ *NAB/CTIA Reply Comments on Avatar Report* at 11.

⁸² Reply Comments of APCO International 1 (Dec. 10, 2003) ("*APCO Reply Comments*").

⁸³ 47 C.F.R. § 1.1307(a).

⁸⁴ *LPP Report* at 28.

⁸⁵ *Avatar Report* at 3-40.

conclusions as to the specific importance of these factors."⁸⁶ Even the U.S. Fish and Wildlife Service conceded that "the impacts to birds of communication towers situated on ridges, mountains, and other high ground are not well known" and that additional information is necessary on the siting of towers near water or wetlands.⁸⁷ While most commenters agree that existing scientific studies are extremely limited in scope and are not representative of all geographical regions of the United States, "Union is not aware of any recent studies that examine communications towers in its service area of Wyoming, northwestern Colorado, and parts of Utah.

The FCC should not impose additional restrictions on the location of towers as a practical matter. For example, commenters state that the siting of towers in areas with fog, mist, or low ceilings is necessary to ensure seamless service to those areas.⁸⁹ Tower siting is also critical to the design of public safety communications systems.⁹⁰

D. Collocation

The FCC should not adopt any requirements to promote collocation of antennas on existing structures. In the *NPRM*, the FCC asked if it should require applicants "to certify that collocation opportunities are unavailable and/or describe collocation alternatives that the licensee explored."⁹¹ These requirements are unnecessary because applicants already have a financial

⁸⁶ *Id.* at 3-41.

⁸⁷ *FWS Comments* at 10.

⁸⁸ *NAB/CTIA Reply Comments on Avatar Report* at 14; *Cingular Comments on Avatar Report* at 11; *Woodlot Report* at 16-19.

⁸⁹ *Centerpointe Comments* at 10-11; *PCIA Reply Comments* at 3; *Cingular/SBC Comments* at 11.

⁹⁰ *APCO Reply Comments* at 1.

⁹¹ *NPRM*, 21 FCC Rcd at 13267-68 ¶ 60

incentive to collocate antennas on existing structures, whenever possible. The collocation of antennas also involves the balancing of several factors, such as the topography, potential for harmful interference, ease of negotiating site agreements, and space available on the existing tower.⁹² An applicant should not face the additional burden of having to justify its choice of sites or having the FCC pass judgment on the sufficiency of its efforts to collocate its antenna.

E. Environmental Assessments

The FCC should not routinely require environmental processing for every communications tower. In particular, the FCC should not require the preparation of an environmental assessment ("EA") or environmental impact statement ("EIS") for every communications tower. The FCC also should reject the Fish and Wildlife Service's recommendations that (1) tower owners submit Tower Site Evaluation Forms to request Service approval of proposed towers and (2) the FCC add a new category to its NEPA procedures for towers that may affect migratory birds.⁹³

The adoption of these requirements would be arbitrary and capricious because the existing scientific evidence fails to demonstrate that all, or even most, communications towers pose a threat to migratory birds and, thus, warrant environmental processing. Commenters also predict that such requirements would tie up tower construction decisions for several years, grind to a halt the expansion of wireless infrastructure to rural areas, impede the provision of wireless services, and cost wireless consumers and taxpayers millions of dollars.⁹⁴

⁹² *PCIA Reply Comments at 2; Cingular/SBC Reply Comments at 11; PCIA Comments at 9-10.*

⁹³ Letter from Kenneth Stansell, Acting Deputy Director, Fish and Wildlife Service, to Louis Peraertz, FCC 29-30 (Feb. 2, 2007).

⁹⁴ *Cingular Reply Comments on Avatar Report at 7; NAB/CTIA Reply Comments on Avatar Report at 16-17; Cingular/SBC Reply Comments at 16; USCC Reply Comments at 8; API Comments at 6; CTIA/NAB Comments at 7.*

If an individual tower would pose a threat to the environment, the FCC already has the authority to require the preparation of an EA and EIS on a case-by-case basis either upon petition or on its own motion.⁹⁵ Assuming, *arguendo*, that the FCC does adopt a broadly applicable requirement, the existing evidence suggests that additional environmental processing should apply only to new towers that have guy wires or exceed 500 feet above ground level.⁹⁶

F. Other Possible Actions

The FCC should not require tower owners or licensees to conduct additional research on the impact of communications towers on migratory birds. Specifically, the FCC should reject the Fish and Wildlife Service's recommendation that applicants (1) provide data from remote sensing studies to demonstrate that their proposed towers would not present a substantial risk to migratory birds, and (2) engage in a post-construction monitoring process.⁹⁷ While the FCC lacks the statutory authority to impose additional research obligations,⁹⁸ such obligations also would require a substantial investment of resources and delay the deployment of wireless services to rural and tribal areas.

V. CONCLUSION

Union applauds the FCC for its efforts to inquire into the impact that collisions with communications towers may have on migratory birds. Although Union supports the protection of migratory birds, it questions whether the FCC has the statutory authority to regulate the construction of communications towers for that purpose. Union also notes that the scientific

⁹⁵ 47 C.F.R. § 1.1307(c), (d)

⁹⁶ See text accompanying footnotes 59 and 74-79

⁹⁷ Letter from Kenneth Stansell, Acting Deputy Director, Fish and Wildlife Service, to Louis Peraertz, FCC at 30-31 (Feb. 2, 2007).


⁹⁸ *CTIA/NAB Comments on Avatar Report* at 12-14

evidence remains insufficient to justify the imposition of blanket restrictions on communications towers at this time. Even if the FCC were to find statutory authority and probative scientific evidence, it should continue its policy of applying additional restrictions on a case-by-case basis.

WHEREFORE, THE PREMISES CONSIDERED, Union respectfully requests that the FCC consider these Comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: April 23, 2007